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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SEDIGHEH TAHMASEBI,

Plaintiff and Respondent,

v.

GORDON LANE HEALTHCARE, LLC  
et al.,

Defendants and Appellants.

G056154

(Super. Ct. No. 30-2017-00944292)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Lann G. McIntyre, Kathleen M. Walker, Staci L. Trang, and Mason T. Smith for Defendants and Appellants.

The Torkzadeh Law Firm, Reza Torkzadeh and Korosh Torkzadeh;  
Gharibian Law and Art Gharibian for Plaintiff and Respondent.

Gordon Lane Healthcare, LLC dba Gordon Lane Care Center and Sun Mar Management Services (hereafter collectively referred to in the singular as Gordon Lane) appeal from the trial court's order denying its petition for arbitration. The court determined Gordon Lane submitted an arbitration agreement that was unenforceable against Sedigheh Tahmasebi, who filed a lawsuit raising allegations of elder abuse and negligence. We agree and affirm the order.

### FACTS

Gordon Lane is a licensed skilled nursing facility that provides long-term custodial care.<sup>1</sup> The complaint alleged, "[T]he elderly segment of the population is particularly subject to various forms of abuse and neglect. Physical infirmity or mental impairments, such as those suffered by [Tahmasebi], often place the elderly in a dependent and vulnerable position. At the same time, these impairments have left the elderly, and [Tahmasebi], incapable of asking for help and/or protection."

The complaint stated that on May 12, 2017, "[Tahmasebi,] who is an 86 year[]-old Farsi speaking elderly woman, was admitted to [Gordon Lane] for treatment and rehabilitation after having undergone total left knee replacement at Anaheim Regional Medical Center [two days earlier]. Upon admission . . . [she] was documented as a high-risk for injury and dependent upon staff for activities of daily living."

Tahmasebi alleged she did not receive "basic medical care and services" because the facility failed to provide the "necessary supervision and assistance to prevent injury and timely care and treatment after having suffering injuries alleged herein." Specifically, on June 4, 2017, a Gordon Lane "nursing assistant recklessly pushed [Tahmasebi] on her wheelchair causing her to strike her left knee on the bathroom door. After this occurred, no follow up was made by [Gordon Lane] to assess whether [she]

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<sup>1</sup> The complaint alleged Gordon Lane is a nursing facility located in Fullerton, which is managed/owned/operated by Sun Mar Management Services.

was injured, and if so, to provide necessary care and treatment. In fact, it was not until [Tahmasebi] told her friend (Farsi speaking) who had been visiting what happened did . . . staff finally take action. [¶] A left knee X-ray indicated that, as a result of the incident on June 4, 2017, [Tahmasebi] had suffered a new patella fracture and her knee was hyper-flexed. Indeed, an X-ray taken of [her] left knee two weeks earlier indicated [it] was normal and properly aligned.” Tahmasebi concluded Gordon Lane’s neglect resulted in “excessive pain and suffering, lengthy rehabilitation, narcotic pain medication not otherwise required, the loss of independence, and diminished her functional capacity necessitating reliance on others for her daily needs.”

#### *I. Petition to Compel Arbitration*

Gordon Lane filed a petition to compel arbitration and attached a copy of an arbitration agreement providing any dispute between the “resident” and the facility would be determined by submission to binding arbitration. The agreement stated execution was not a condition to admission to the facility. Gordon Lane’s “Admissions Director” signed the document, but Tahmasebi did not. Tahmasebi’s son, Fred Amin, signed his name on the line designated for “Resident Representative/Agent Signature.”

On the last page of the agreement, directly above the signature lines, was the following statement, “The Resident and/or Resident’s Representative/Agent certifies that he/she has read this Agreement and has been given a copy of this Agreement, and affirmatively represents that he/she is duly authorized, by virtue of the Resident’s consent, instruction and/or durable power of attorney, to execute this Agreement and accept its terms on behalf of the Resident. The Resident and/or Resident’s Representative/Agent acknowledges that the Facility is relying on the aforementioned certification.”

The agreement provided two separate places for the parties’ signatures. The first set of signatures related to a sentence in bold red type stating, “NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF

MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE I OF THIS CONTRACT.” The second set of signatures related to a similar bold red-type sentence, explaining arbitration included all claims, not just those related to medical malpractice. The arbitration agreement was purportedly executed on May 25, 2017.

To support its petition to compel arbitration, Gordon Lane submitted a declaration prepared by the facility’s admissions director, Ana Huerta. She stated, “As part of my duties, I oversee residents’ admissions paperwork including arbitration agreements. I have personal knowledge of the facts contained herein and if called to testify I could and would do so competently.” She stated there were two exhibits attached to her declaration. Exhibit A was a copy of the arbitration agreement signed by Tahmasebi’s son and “me as the facility representative.” Exhibit B was a copy of Tahmasebi’s “History and Physical.” She did not attach copies of the other “admissions paperwork” described in her declaration.

In the last section of her declaration, Huerta declared the following: “[Tahmasebi] verbally authorized her son . . . Amin to act on her behalf in signing [Gordon Lane’s] Admission Agreement and Arbitration Agreement. I reviewed the admissions package with . . . Amin, [Tahmasebi’s] son and surrogate decision maker. As part of the admissions process. I presented him with the arbitration agreement and he voluntarily signed the arbitration agreement.”

Exhibit A contains the two-page arbitration agreement dated May 25, 2017. Exhibit B was a document prepared 10 days earlier (dated May 15, 2017), containing handwritten notes about Tahmasebi’s medical history, the results of a medical examination, and a diagnosis listing eight medical conditions. The next section contained a few boxes available to place a check mark, signifying the resident’s level of mental “capacity to understand and make decisions.” On the form, the box was checked indicating there was no issue with Tahmasebi’s mental capacity. Next, the form

contained the written statement that the “rehabilitation potential” was “good” and that the “resident/responsible party [was] informed of medical condition and plan of treatment.” (Capitalization and bold omitted.) It is unclear who made the handwritten notes, but there is an indecipherable signature at the bottom of the page, directly above the phrase “Physician’s Signature.”

## II. *Opposition and Objection to Huerta’s Declaration*

In Tahmasebi’s opposition to the arbitration petition, she argued her son did not have authority to bind her to contractual arbitration because there was no agency relationship. She maintained the petition was based on inadmissible hearsay, i.e., Huerta’s declaration asserting Tahmasebi “verbally authorized” her son to sign the agreement on her behalf. Tahmasebi maintained it was unlikely Huerta could have understood anything she said unless Huerta was bilingual and could understand Farsi. To support this assertion, Tahmasebi submitted her declaration, her attorney’s declaration, and the same patient history Huerta supplied (Exhibit B), which confirmed Tahmasebi spoke Farsi. In her declaration, Tahmasebi stated, “I cannot read English or speak English as my primary language is Farsi.” She explained, “At no point did I tell anyone from Gordon Lane . . . that my son, . . . Amin[,] had authority to act on my behalf in signing the arbitration agreement.”

In her opposition, Tahmasebi also argued the agreement was unenforceable under Health and Safety Code section 1599.65, which required such agreements to be signed prior to or at the time of admission. Gordon Lane admitted Tahmasebi on May 12, 2017, but did not present her with an arbitration agreement and admissions paperwork until two weeks later, on May 25. Finally, she urged the court to exercise its discretion under Code of Civil Procedure section 1281.2, subdivision (c), and deny the petition to compel arbitration to avoid conflicting rulings. She pointed out one of the co-defendants was not a party to the arbitration agreement.

Tahmasebi separately filed evidentiary objections to Huerta's declaration. Specifically, she asserted Huerta's statement that Tahmasebi "verbalized authoriz[ation to] her son" to act on her behalf was not based on Huerta's personal knowledge and was inadmissible hearsay. She argued Huerta's declaration did not indicate she was personally present when Tahmasebi purportedly "verbalized" her authorization. In addition, because Tahmasebi was unable to speak or understand English, it would have been impossible for her to have spoken to Huerta in English or understood what Huerta was telling her.

### *III. Reply and Supplemental Declaration*

Gordon Lane's reply brief was based entirely on the new information contained in Huerta's revised declaration. Huerta provided details about her contact with Tahmasebi and her son. Huerta explained she met with them "at the same time regarding" the "admissions paperwork." She declared, "As part of the admissions process, I went over and explained the admissions paperwork to . . . Amin who in turn advised his mother. I was present and overheard . . . Amin advising his mother in Farsi about the admissions paperwork consisting of the admissions agreement and arbitration agreement. I observed [Tahmasebi] nodding her head in agreement that her son could sign [the] admissions agreement and arbitration agreement. Additionally, . . . Amin stated to me and represented that his mother gave him permission to act on her behalf in signing [Gordon Lane's] admissions agreement and arbitration agreement. Thereafter, . . . Amin voluntarily signed [the documents] in my presence." Gordon Lane argued this evidence proved Tahmasebi authorized her son to act as her agent, "conferring the authority upon him to bind her" to the various agreements.

### *IV. The Hearing*

The court's tentative ruling was to deny the petition and sustain the objection to Huerta's declaration. It ruled, "The declarant provides no foundation for her personal knowledge, given that any verbal statement by [Tahmasebi] would be in Farsi."

At the hearing, Gordon Lane's counsel argued the court should not be concerned Tahmasebi spoke Farsi because in her declaration she did not state she also did not understand English. She only said she did not read or speak it. Counsel noted Tahmasebi's declaration did not directly prove she told her son that he could not act as her agent.

Tahmasebi's counsel responded by pointing out Huerta's supplemental declaration was attached to the reply brief and he did not have the opportunity to "address the new story offered by the admissions director[.]" He noted Tahmasebi's declaration was filed as part of the opposition and directly refuted Huerta's first declaration. He argued Huerta's second declarations contradicted the first one, which asserted Tahmasebi "verbally authorized" her son to sign the agreement. The second version, after being reminded Tahmasebi only spoke Farsi, asserted Tahmasebi nodded her head to give authorization. Counsel questioned what weight should be given to the second declaration, which contained a very detailed account of what allegedly transpired over a year ago when Tahmasebi was but one of hundreds of patients at the facility. Finally, counsel stated that if the court was willing to continue the hearing, Tahmasebi would provide a second declaration directly refuting "the admissions director's supplemental declaration."

The court made the tentative ruling its final ruling, denying the petition to compel arbitration. It added, "Even if the court overrules the objections, the declaration simply is not credible. [Tahmasebi] does not speak English, and there is no evidence that the declarant understands Farsi." The minute order stated the petition was denied because Gordon Lane failed to show the existence of a valid arbitration agreement.

## DISCUSSION

### *I. Applicable Law*

"Section 1281.2 requires a court to order arbitration "if it determines that an agreement to arbitrate . . . exists . . . ." [Citation.]' [Citation.] Sections 1281.2 and

1290.2 create a summary proceeding for resolving petitions to compel arbitration. [Citations.] The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence, and any oral testimony the court may receive at its discretion, to reach a final determination. [Citation.]” (*Ruiz v. Moss Bros. Auto Group* (2014) 232 Cal.App.4th 836, 841-842.)

In ruling Gordon Lane failed to establish the existence of a valid arbitration agreement with Tahmesebi, the court also concluded Gordon Lane did not prove by a preponderance of the evidence that Tahmasebi’s son had the legal authority to execute the agreement on her behalf. We must decide if substantial evidence supports this ruling. Contrary to Gordon Lane’s belief, we cannot apply our own de novo review because there was conflicting evidence on the issue of agency. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 [when evidence not in conflict, order denying arbitration reviewed de novo].)

With respect to the issue of agency, Gordon Lane had the burden of proving a legally cognizable agency relationship between Amin and Tahmesebi to establish there was a binding enforceable arbitration agreement with Tahmesebi. “Generally, a person who is not a party to an arbitration agreement is not bound by it. [Citation.] However, there are exceptions. For example, . . . a person who is authorized to act as the patient’s agent can bind the patient to an arbitration agreement. [Citations.] (*Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 587 (*Flores*).)

When, as in this case, there is no written agency authorization, “an agency relationship may arise by oral consent or by implication from the conduct of the parties. [Citation.] However, an agency cannot be created by the conduct of the agent alone; rather, *conduct by the principal* is essential to create the agency. Agency ‘can be



established either by agreement between the agent and the principal, that is, a true agency [citation], or it can be founded on ostensible authority, that is, some intentional conduct or neglect on the part of the alleged principal creating a belief in the minds of third persons that an agency exists, and a reasonable reliance thereon by such third persons.’ [Citations.] “‘The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on his behalf and subject to his control.’ . . .” [Citations.] Thus, the “formation of an agency relationship is a bilateral matter. Words or conduct by *both principal and agent* are necessary to create the relationship . . . .” [Citation.]” (*Flores, supra*, 148 Cal.App.4th at pp. 587-588.)

## II. Analysis

Gordon Lane sought to compel arbitration based on an agreement signed by Tahmasebi’s son, acting as her actual or ostensible agent. Initially, Huerta declared she heard Tahmasebi “verbally” authorize Amin to sign the agreement on her behalf. After it was pointed out Huerta would not have understood a *verbal authorization* unless she spoke Farsi, Huerta changed her story. She claimed to have overheard a conversation in Farsi about the paperwork and then saw Tahmasebi “nodding her head in agreement” that her son could sign the documents because that is what Amin told her.

Noticeably missing from Huerta’s reply declaration is any explanation as to why she previously testified that *she heard* Tahmasebi’s verbal authorization. Huerta had the opportunity in the second declaration to clarify she was bilingual, but she did not. Consequently, it can be reasonably inferred Huerta did not understand anything Tahmasebi or Amin said in Farsi that day, a highly relevant contradiction of the first declaration.

Certainly, a trial court may disregard inconsistent declarations. For example, in the context of summary judgment motions, “It is well-established that ‘a party cannot create an issue of fact by a declaration which contradicts his prior discovery responses.’ [Citations.] In determining whether any triable issue of material fact exists,

the trial court may give ‘great weight’ to admissions made in discovery and ‘disregard contradictory and self-serving affidavits of the party.’ (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087.) In this case, Gordon Lane had the burden of proving the existence of a valid agreement by a preponderance of the evidence, a higher burden than what is required for summary judgment. We conclude the trial court reasonably disregarded, or gave minimal weight to, the contradicting statements made in Huerta’s two declarations. Without sufficient evidence Amin was authorized to sign the arbitration agreement for his mother, Gordon Lane cannot meet its burden of proving the existence of the agency relationship needed to make the arbitration agreement enforceable against Tahmesebi.

We also find troubling several speculative statements contained in Huerta’s reply declaration, which further weakened the weight of this evidence. According to Huerta, Amin advised his mother in Farsi about the contents of the admissions paperwork. For the sake of argument, if we accept this assumption as true, it begs the following question: Why did Tahmesebi need an agent to sign the documents? After listening to the translation, Tahmesebi had the capacity to execute the arbitration agreement herself. She was recovering from knee surgery, not hand surgery, and there was no other evidence suggesting she lacked the physical ability to sign her name. As mentioned above, the medical notes contained in Exhibit B clearly stated Tahmesebi had the mental “capacity to understand and make decisions,” which would include deciding to waive her right to a jury trial.

Moreover, there is little reason to accept Huerta’s assumptions about the nature of Tahmesebi’s conversation with her son that day. Although the admissions process was clearly Huerta’s goal that day, it is conjecture to say Tahmesebi or Amin shared Huerta’s desire to finish the paperwork. Huerta did not profess to understand Amin’s alleged translation of the various admissions documents. Indeed, she does not explain why she believed Amin’s dialog in Farsi was an accurate translation of the

arbitration agreement's provisions, as opposed to a discussion about some another topic. Huerta did not say how long the entire conversation lasted, or *when she saw* Tahmesebi move her head. She did not claim to be familiar with the parties, their customs, or culture. Huerta's opinion reflects her assumption Tahmesebi and Amin were interested in helping with the admissions process. This conclusion is debatable in light of evidence the facility admitted Tahmesebi 13 days earlier. Any obstacles to her admission were no longer pressing or relevant. Amin may not have wanted to concern his elderly mother with the details of the paperwork and used the meeting time to discuss other matters. Thus, it was just as likely Tahmesebi's head nod was in response to a myriad of other possible questions typically asked of an elderly patient two weeks post-surgery.

In light of our limited standard of review, we conclude substantial evidence supports the trial court's ruling. The court, as the trier of fact, weighed the declarations and other evidence presented. It was entirely reasonable for the trial court to find Tahmesebi's declaration more reliable than Huerta's personal theory about what she thought was happening that day. This is especially true in light of the evidence Tahmesebi had both the physical and mental capacity to sign the documents if they had in fact been translated for her to understand. There is substantial evidence supporting the court's conclusion Huerta's "declaration simply [was] not credible" and, therefore, Gordon Lane failed to meet its burden of proving there was an enforceable contract.

### III. *Evidentiary Ruling*

In light of the above discussion, there is little reason to also examine the court's decision to sustain Tahmesebi's evidentiary objection. The record showed the court denied the petition primarily on the grounds that Huerta's conflicting and speculative declarations lacked credibility. Nevertheless, we can easily affirm the evidentiary ruling.

Gordon Lane asserts Huerta had "personal knowledge as to Tahmesebi's bestowment of authority" due to the context surrounding Amin's execution of the

arbitration agreement. It concludes the court abused its discretion because Huerta directly observed both the conversation and the parties' conduct. It argues Huerta's "failure to understand Farsi does not undermine her perception of the events that transpired and the reasonable inferences she could draw from that perception."

This argument misstates the scope of the objection and the court's ruling. Tahmasebi's objection was only directed towards Huerta's statement in the first declaration that Tahmesebi "verbally authorized" her son to sign the agreement as lacking foundation because it was not based on personal knowledge. The court agreed, stating there was "no foundation for her personal knowledge, given that any verbal statement . . . would be in Farsi." Gordon Lane's argument on appeal appears to concede Huerta did not understand Farsi. Thus, it cannot be said the court abused its discretion in sustaining an objection to the sentence in Huerta's first declaration where she claimed to hear Tahmasebi's verbal authorization. If Huerta heard anything said in Farsi she would not have understood it.

It appears that Gordon Lane's argument on appeal is premised on the theory the court sustained objections to both declarations. Focusing on Huerta's second declaration, Gordon Lane asserts the court should have considered Huerta's perception of events and the "reasonable inferences" she made. However, there is nothing in the record to support the notion the court's ruling addressed any statement written in the second reply declaration. The court's minute order specifically sustained an objection to Huerta's statement regarding Tahmasebi's "verbal statement," which was an allegation omitted from the second declaration. The court did not say anything at the hearing to suggest its evidentiary ruling related to both declarations. To the contrary, it stated, "[e]ven if the court overrules the objections, the declaration simply is not credible. [Tahmesebi] does not speak English, and there is no evidence that the declarant understands Farsi." The record shows the court made its ruling after weighing the

credibility of both parties' supporting declarations, not due to the one evidentiary ruling relating to Huerta's original declaration.

We agree with Gordon Lane's argument Huerta's statements that related to what she personally observed were admissible. Her statements regarding what she heard Amin say in English were also admissible. However, opinions interpreting the parties' conduct or Tahmasebi's state of mind when she nodded her head lacked credibility, were speculative, and could properly be disregarded. Huerta was a stranger to these parties, and she did not claim to possess any familiarity with the cultural nuances, or even the countries, where Farsi is spoken. She had no personal basis, or expertise, from which to offer her opinion interpreting Tahmasebi's body language or gestures.

#### DISPOSITION

The order is affirmed. Respondent shall recover her costs on appeal.

O'LEARY, P. J.

WE CONCUR:

THOMPSON, J.

GOETHALS, J.